BRIEF FOR RESPONDENT MERIT SYSTEMS PROTECTION BOARD

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NOS. 2015-3135, -3211

JOSEPH P. CARSON,
Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

PETITION FOR REVIEW OF DECISIONS OF THE
MERIT SYSTEMS PROTECTION BOARD IN
AT-1221-14-0620-W-1 AND AT-1221-15-0092-W-1

Respectfully submitted,

BRYAN G. POLISUK
General Counsel

JEFFREY A. GAUGER
Attorney
Office of the General Counsel
Merit Systems Protection Board
1615 M Street, NW
Washington, DC 20419-0002
(202) 254-4488

DATE: June 3, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF RELATED CASES

Pursuant to Fed. Cir. R. 47.5, counsel for the respondent Merit Systems Protection Board ("MSPB") states that the petitioner has three cases pending before the United States Court of Appeals for the District of Columbia Circuit that may be affected by this Court's decision:

In Carson v. Merit Sys. Prot. Bd., D.C. Cir. No. 14-1306, the court granted the MSPB's motion for summary denial of Mr. Carson's petition for review in an unpublished order dated October 6, 2015. The Court held that Mr. Carson failed to make a nonfrivolous allegation that the MSPB took a personnel action against him in retaliation for making a disclosure protected under the Whistleblower Protection Act ("WPA"). The court issued an order on November 17, 2015, holding the mandate in abeyance pending this Court's decision in the instant case.

In Carson v. Merit Sys. Prot. Bd., D.C. Cir. No. 15-1206, the court issued an order on October 30, 2015, holding the case in abeyance pending this Court's decision in the instant case.

In Carson v. Merit Sys. Prot. Bd., D.C. Cir. No. 15-1286, the court issued an order on October 7, 2015, holding the case in abeyance pending the issuance of the mandate in D.C. Cir. No. 14-1306.

BRIEF FOR RESPONDENT MERIT SYSTEMS PROTECTION BOARD

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NOS. 2015-3135, -3211

JOSEPH P. CARSON,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

PETITION FOR REVIEW OF DECISIONS OF THE
MERIT SYSTEMS PROTECTION BOARD IN
AT-1221-14-0620-W-1 AND AT-1221-15-0092-W-1

STATEMENT OF JURISDICTION

This Court has jurisdiction to review a final order or decision of the MSPB pursuant to 5 U.S.C. § 7703(b)(1)(A) and 28 U.S.C. § 1295(a)(9).

STATEMENT OF THE ISSUES

1. Whether the petitioner nonfrivolously alleged that the Special Counsel – who is not the petitioner's employer – made significant changes to his duties, responsibilities, or working conditions such that those significant changes constitute a "personnel action" under the WPA.

2. Whether the MSPB properly dismissed the petitioner's second individual right of action ("IRA") appeal for adjudicatory efficiency given that it raised the same dispositive jurisdictional issue as his first IRA appeal.

STATEMENT OF THE CASE

A. Nature of the Case

Petitioner, Joseph P. Carson, seeks review of an MSPB decision that dismissed his IRA appeal for lack of jurisdiction. Carson v. Office of Special Counsel ("Carson I"), MSPB No. AT-1221-14-0620-W-1 (Final Order, March 25, 2015), Appx. 1-11.[1] Mr. Carson also appeals from the dismissal of his subsequent IRA appeal for adjudicatory efficiency. Carson v. Office of Special Counsel ("Carson II"), MSPB No. AT-1221-15-0092-W-1 (Final Order, Aug. 17, 2015), Appx12-21.

[1] "Appx__" refers to pages of the joint appendix to be filed by the petitioner.

B. Statement of Facts and Disposition Below

1. Facts

Mr. Carson is a general engineer employed as a "Facility Representative" by the Department of Energy ("DOE") in Oak Ridge, Tennessee. Appx78. Throughout his career with the DOE, Mr. Carson has been prolific in filing complaints alleging government wrongdoing with the Office of Special Counsel ("OSC").[2] See, e.g., Petitioner's Brief ("PB") 7 (discussing Mr. Carson's nearly 25 years of filing OSC complaints). Most of those complaints were directed at his employer, the DOE.

In December 2013, Mr. Carson filed a complaint with the OSC and alleged that a prohibited personnel practice ("PPP") was taken by Carolyn Lerner, who is the Special Counsel and head of the OSC. Appx87. He alleged that, over a 10-year period, he disclosed to Congress, the OSC, and federal courts that the OSC failed to protect federal employees from PPPs in violation of "its nondiscretionary statutory duties." Appx92. According to Mr. Carson, Ms. Lerner retaliated against him for these disclosures by taking the following personnel action against him:

[2] Pursuant to 5 U.S.C. § 1214(a)(1)(A), the OSC "shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken."

> OSC has created, via its decades-long, continuing law-breaking, "any other significant change in duties, responsibilities or working conditions," for me by the Supreme Court precedent in Burlington North, and Santa Fe Ry. Co. v. White, 126 S.Ct. 2405 (2006), because its law-breaking and failure to take any steps to resolve it would dissuade a reasonable co-worker from making protected disclosures to OSC, from engaging in the protected activity of filing a whistleblower reprisal or other PPP complaint with OSC, or from assisting an OSC investigation.

Appx92-93.

Because the complaint was against the OSC and Special Counsel Lerner, the OSC referred it to the Integrity Committee of the Council of Inspectors General for Integrity and Efficiency ("Integrity Committee"). Appx94. On March 6, 2014, the Integrity Committee informed Mr. Carson that his allegations did not meet the threshold standard necessary for further review and stated that it was closing the complaint. Appx97.

Mr. Carson filed another OSC complaint in June 2014. Appx158-163. He stated that the "OSC has willfully refused or failed to comply with a large number of its statutory duties to protect me from agency reprisal in its investigation and closure of my whistleblower reprisal complaints to it...." Appx161. He asserted that Ms. Lerner had committed the same "personnel action" as in his prior complaint. Id. The OSC responded that "Special Counsel Carolyn Lerner does not have personnel action authority with respect to your allegations and did not take a personnel action against you."

Appx168. The OSC therefore closed the complaint and notified Mr. Carson of his MSPB appeal rights. Appx168-69.

2. Proceedings in Carson I, MSPB No. AT-1221-14-0620-W-1

Mr. Carson filed an IRA appeal with the MSPB promptly after the Integrity Committee closed its investigation into his first complaint. Appx78-84. He stated that the "personnel action" taken against him by the OSC was "any other significant change in working conditions." Appx81 (appeal form box 12). He did not identify the date of the personnel action. Id. (appeal form box 14).

The MSPB administrative judge assigned to the case issued an order explaining the criteria for establishing the MSPB's jurisdiction over an IRA appeal under the WPA. Appx371-72. The administrative judge noted that Mr. Carson was not an employee or an applicant for employment with the OSC, and therefore his allegation that the OSC took, proposed to take, or failed to take a personnel action against him appeared to be frivolous. Appx372. The administrative judge informed Mr. Carson that he had the burden of proof on jurisdiction and ordered him to show cause why the appeal should not be dismissed for lack of jurisdiction. Appx371. In response, Mr. Carson explained his theory of the "personnel action" taken against him by the OSC:

> When OSC fails or refuses to comply with one or more aspects of its non-discretionary statutory duties as a disclosure channel to a federal agency employee or to protect a federal agency employee from reprisal, OSC causes a personnel action for that federal agency employee by 5 U.S.C. § 2302(a)(2)(A)(xii), "any other significant change in duties, responsibilities or working conditions" because "it might well dissuade a reasonable coworker from making a protected disclosure or engaging in a protected activity...."

Appx102-105.

In an initial decision dated July 25, 2014, the administrative judge dismissed Mr. Carson's IRA appeal for lack of jurisdiction. Appx26-35. The administrative judge determined that Mr. Carson failed to nonfrivolously allege that the OSC had taken a personnel action concerning him. Appx28. The administrative judge stated that the "OSC is not the appellant's employing agency nor did the appellant apply to OSC for any type of work, transfer, detail, emolument, restoration or other attribute of employment." Id. The administrative judge further found that the OSC's investigations and prosecutorial decisions are not personnel actions within the meaning of the WPA. Appx29.

Mr. Carson filed an administrative petition for review with the three-member Board ("Board") in Washington, D.C. Appx132-41. In addition to arguing that the administrative judge erred in his decision, Mr. Carson also asserted that the "MSPB enables OSC's law-breaking by NOT conducting

the requisite 'special studies' of its functioning in its non-discretionary statutory duties related to the integrity of the federal civil service...." Appx134.

On March 25, 2015, the Board denied Mr. Carson's petition for review and affirmed the administrative judge's decision. Appx1-11. The Board agreed with the administrative judge that, "although the OSC's investigations and prosecutorial decisions may be of keen interest" to Mr. Carson, they do not constitute personnel actions within the meaning of the WPA. Appx4-5. The Board noted that Mr. Carson had not alleged that the OSC's actions or inactions resulted in any specific changes in his own job duties, responsibilities, or working conditions. Appx5. The Board stated that it would not address Mr. Carson's allegations that the MSPB enables the OSC's violations of law by failing to conduct "special studies" because Mr. Carson had previously raised that issue in an IRA appeal against the MSPB itself.[3] Because the Board's members recused themselves in that case, the Board stated that it would not address the issue. Appx8-9. Mr.

[3] That case, Carson v. Merit Sys. Prot. Bd., MSPB Docket No. AT-1221-14-0637-W-1 (Order, Dec. 23, 2014), is one of Mr. Carson's three pending cases before the U.S. Court of Appeal for the District of Columbia Circuit. Carson v. Merit Sys. Prot. Bd., D.C. Cir. No. 14-1306. The D.C. Circuit granted the MSPB's motion for summary denial of Mr. Carson's appeal, but the court is holding the mandate in abeyance pending a decision in the instant case.

Carson appealed the final MSPB order to this Court and the case was assigned docket number 2015-3135.

3. Proceedings in Carson II, Docket No. AT-1221-15-0092-W-1

Mr. Carson filed another IRA appeal with the MSPB on October 22, 2014. See Appx55. The MSPB administrative judge assigned to the case issued an order delineating the criteria for establishing the MSPB's jurisdiction over an IRA appeal under the WPA. Appx189-94. Among other things, the administrative judge explained that Mr. Carson must make a nonfrivolous allegation that the OSC retaliated against him by taking or failing to take, or threatening to take or fail to take, a "personnel action" as defined by the WPA. Appx192. The administrative judge informed Mr. Carson that he had the burden of proof on jurisdiction and ordered him to file a submission addressing the jurisdictional issues, including the issue of whether the OSC had taken a personnel action against him. Appx193. In response to the show-cause order, Mr. Carson alleged that the OSC took a personnel action against him by "failure or refusal" to protect him from whistleblower reprisal by investigating and closing his complaints. Appx201.

In an initial decision dated January 13, 2015, the administrative judge dismissed Mr. Carson's IRA appeal for lack of jurisdiction. Appx55-65.

The administrative judge determined that Mr. Carson failed to nonfrivolously allege that the OSC had taken a personnel action concerning him. Appx57. In doing so, the administrative judge relied on the reasoning of the administrative judge who dismissed for want of jurisdiction Mr. Carson's IRA appeal in Carson I. Appx58.

On review, the Board affirmed the initial decision, but modified it to dismiss the appeal based on adjudicatory efficiency, and to acknowledge and decline to address Mr. Carson's claims against the MSPB. Appx12-21. The Board stated that, when an appellant files an appeal that raises the same claims raised in an earlier appeal before the decision in the earlier appeal has become final, it may dismiss the subsequent claims based upon adjudicatory efficiency. Appx17. The Board found that the determinative jurisdictional issue – whether Mr. Carson raised a nonfrivolous allegation that the OSC's investigations and prosecutorial decisions constitute personnel actions within the meaning of the WPA – was identical to the determinative jurisdictional issue in Carson I. Appx18. The Board further noted that the issue would be decided by this Court because Mr. Carson had filed a petition for judicial review of the final MSPB decision in Carson I.

The Board again stated that it would not address Mr. Carson's allegations that the MSPB enables the OSC's violations of law by failing to

conduct "special studies" because the Board's members had previously recused themselves from considering the issue. Appx15-16. The Board members similarly recused themselves from addressing Mr. Carson's new allegation that the Board took a personnel action against him by failing or refusing to address his whistleblower disclosures regarding the OSC. Appx16.

Mr. Carson appealed from the final Board order to this Court, and the case was assigned docket number 2015-3211. On October 19, 2015, the Court granted Mr. Carson's unopposed motion to consolidate his appeals in numbers 2015-3135 and 2015-3211.

STANDARD OF REVIEW

This Court must affirm the decision of the MSPB unless it is: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without following the procedures required by law; or (3) unsupported by substantial evidence. 5 U.S.C. § 7703(c); Forest v. Merit Sys. Prot. Bd., 47 F.3d 409, 410 (Fed. Cir. 1995). Whether the MSPB has jurisdiction to adjudicate an appeal is a question of law, which this Court reviews de novo. Id. As discussed below, the Board did not abuse its discretion in determining that Mr. Carson failed to nonfrivolously allege that a "personnel action" was taken against him within the meaning of 5

U.S.C. § 2302(a)(2)(A) and he therefore did not establish the MSPB's jurisdiction over his appeal under the WPA.

SUMMARY OF ARGUMENT

The WPA provides that an agency, in response to a protected disclosure of information by an employee, shall not "take or fail to take, or threaten to take or fail to take, a personnel action." Mr. Carson alleges that, any time the OSC does not comply with its statutory duties, it is taking a personnel action because "it might well dissuade a reasonable coworker from making a protected disclosure or engaging in a protected activity." Mr. Carson contends that the personnel action involves a "significant change in duties, responsibilities, or working conditions." But Mr. Carson did not allege that the OSC's actions or inactions caused any significant changes to his own job duties, responsibilities, or working conditions. The MSPB is authorized to adjudicate IRA appeals taken against an employee or applicant who is subjected to retaliatory personnel actions, but here Mr. Carson appears to be filing an IRA appeal on behalf of other employees who he believes are dissuaded from making disclosures or engaging in protected whistleblowing.

Furthermore, Mr. Carson's allegations would be insufficient even if they were characterized as relating to actions taken against him, rather than

a coworker. Mr. Carson does not identify any action or inaction by the OSC that resulted in any specific changes to his own job duties, responsibilities, or working conditions. The OSC is not Mr. Carson's employer and he does not allege that the OSC denied an application for employment. The MSPB correctly concluded that the OSC's investigations and prosecutorial decisions do not constitute personnel actions. In sum, Mr. Carson has failed to make a nonfrivolous allegation that the OSC took or failed to take a personnel action against him.

Finally, the Board correctly dismissed Mr. Carson's subsequent appeal on the basis of adjudicatory efficiency. That appeal raised the same jurisdictional issue as to whether Mr. Carson had suffered a personnel action by the OSC. In his opening brief, Mr. Carson did not challenge the dismissal of his second appeal on the grounds of adjudicatory efficiency.

ARGUMENT

I. THE BOARD CORRECTLY DISMISSED CARSON I FOR LACK OF JURISDICTION BECAUSE MR. CARSON DID NOT MAKE A NONFRIVOLOUS ALLEGATION THAT HE WAS SUBJECTED TO A PERSONNEL ACTION

To maintain an IRA appeal under the WPA, a petitioner must exhaust his administrative remedies before the OSC and make nonfrivolous allegations that: (1) He engaged in whistleblowing activity by making a

protected disclosure, and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. Yunus v. Dep't of Veterans Affairs, 242 F.3d 1367, 1371 (Fed. Cir. 2001). Here, both the MSPB administrative judge and the Board correctly determined that Mr. Carson failed to make a nonfrivolous allegation that he suffered a "personnel action" as that term is defined in the WPA. Appx4-6, 28-29.

The WPA provides that an agency, in response to a protected disclosure of information by an employee, shall not "take or fail to take, or threaten to take or fail to take, a personnel action." 5 U.S.C. § 2302(b)(8). Not every agency action is a "personnel action" under the WPA. King v. Dep't of Health & Human Serv., 133 F.3d 1450, 1452-53 (Fed. Cir. 1998). The statute defines "personnel action" to mean:

> (i) an appointment;
> (ii) a promotion;
> (iii) an action under chapter 75 of this title or other disciplinary or corrective action;
> (iv) a detail, transfer, or reassignment;
> (v) a reinstatement;
> (vi) a restoration;
> (vii) a reemployment;
> (viii) a performance evaluation under chapter 43 of this title;
> (ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph;
> (x) a decision to order psychiatric testing or examination;

> (xi) the implementation or enforcement of any nondisclosure policy, form, or agreement; and
> (xii) any other significant change in duties, responsibilities, or working conditions....

5 U.S.C. § 2302(a)(2)(A).

Mr. Carson alleged that when the OSC does not comply with its statutory duties, it causes a "significant change in duties, responsibilities, or working conditions" under 5 U.S.C. § 2302(a)(2)(A)(xii) because "it might well dissuade a reasonable coworker from making a protected disclosure or engaging in a protected activity." Appx105 (citing Shivaee v. Dep't of the Navy, 74 M.S.P.R. 383 (1997); Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006); and Mogenhan v. Napolitano, 613 F.3d 1162 (D.C. Cir. 2010)).[4]

[4] In his opening brief, Mr. Carson no longer argues that Burlington Northern and its progeny, such as Mogehan, are relevant. In Burlington Northern, the Supreme Court held that the anti-retaliation provision in Title VII of the Civil Rights Act of 1964, see 42 U.S.C. § 2000e-3(a), protects an individual "not from all retaliation, but from retaliation that produces injury or harm." 548 U.S. at 67. The Court held that an objective standard applies in such cases and that a plaintiff is required to show that "a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" Id. at 68. Mr. Carson has filed a retaliation claim under the WPA, not Title VII. Even assuming, arguendo, that the Burlington Northern standard applies to Mr. Carson's WPA claim, nothing in the Supreme Court's opinion excuses him from his burden of alleging that the OSC took or failed to take a "personnel action" against him as defined under the WPA, 5 U.S.C. § 2302(a)(2)(A).

Mr. Carson did not allege that the OSC's actions or inactions caused any significant changes to his own job duties, responsibilities, or working conditions. The MSPB is authorized to adjudicate IRA appeals seeking corrective action with respect to a personnel action taken "against such employee." 5 U.S.C. § 1221(a). As this Court has held, the WPA "on its face clearly requires that the allegedly improper personnel practice must be taken or proposed to be taken against the person bringing the IRA appeal." Stoyanov v. Dep't of the Navy, 474 F.3d 1377, 1380-81 (Fed. Cir. 2007). Thus, the Board correctly concluded that Mr. Carson does not have standing to bring an IRA appeal on behalf of his co-workers. Appx6.

Mr. Carson asserts that the Board "misunderstood" his argument and that his actual complaint is that the OSC "is deliberately ignoring his whistleblower complaints." PB 24 (emphasis in original). But Mr. Carson specifically based his "personnel action" allegations on the supposed effect that OSC inaction would have on others, specifically, that "it might well dissuade a reasonable coworker from making a protected disclosure or engaging in a protected activity." Appx105. Mr. Carson now asserts that he intended the phrase "reasonable coworker" to include himself. See PB 25 ("even if the Agency is ignoring whistleblower complaints in the aggregate, Mr. Carson's complaints are among those ignored."). This amounts to a

rewriting of the allegations that he made in his OSC complaint. See Appx91-92 (alleging that OSC's "law-breaking and failure to take any steps to resolve it would dissuade a reasonable co-worker from making protected disclosures to OSC...."). The basis for determining the nature of an employee's charges of whistleblowing are the statements the employee made in his complaint to the OSC, not his subsequent characterization of those statements. Ward v. Merit Sys. Prot. Bd., 981 F.2d 521, 526 (Fed. Cir. 1992).

In any event, even if Mr. Carson's allegations were re-written so that the alleged personnel action was taken against him, rather than his co-workers, they would still fall short of the nonfrivolous standard. While this Court has held that the WPA does not require that a protected employee work for the agency taking the alleged personnel action, see Ruggieri v. Merit Sys. Prot. Bd., 454 F.3d 1323, 1325 (Fed. Cir. 2006), there still must be a nonfrivolous allegation that the agency took or failed to take a "personnel action" as defined by the WPA. In Ruggieri, for example, the Court determined that Mr. Ruggieri, a former Coast Guard employee, made a nonfrivolous allegation that the Department of the Interior failed to take a personnel action when it canceled a vacancy announcement and did not select him for the vacancy. Id. at 1326. The Court stated that the canceling

of the vacancy announcement was an "identifiable step that constitutes a decision not to hire the complainant." Id.

In the instant case, Mr. Carson has not alleged that the OSC has taken or failed to take any personnel action with respect to him, such as a nonselection, transfer, detail, restoration or reemployment.[5] Instead, he claims that the Special Counsel made a significant change in his duties, responsibilities, or working conditions as defined under 5 U.S.C. § 2302(a)(2)(A)(xii). See, e.g., Holderfield v. Merit Sys. Prot. Bd., 326 F.3d 1207, 1209 (Fed. Cir. 2003) (remanding for the Board to determine, inter alia, whether the petitioner's "allegations relating to working conditions amount to a 'significant' change, as the statute requires," and whether they are nonfrivolous). He has not, however, explained how the Special Counsel could take or threaten to take a significant change to his working conditions when she is not his employer or in his chain of command. Mr. Carson's assertion that his OSC complaints are "among those ignored" by the OSC is not an allegation that the OSC made a significant change in his duties, responsibilities, or working conditions. PB

[5] Indeed, Mr. Carson has waived any argument that his allegations relate to any of these types of personnel actions. See, e.g., Appx105 (relying exclusively on the definition of "personnel action" at 5 U.S.C. § 2302(a)(2)(A)(xii) in response to the administrative judge's jurisdictional order).

25. As the Board stated in its final order, "although OSC's investigations and prosecutorial decisions may be of keen interest to the appellant, they do not constitute personnel actions within the meaning of 5 U.S.C. § 2302(a)(2)(A)." Appx4-5.

II. THE BOARD CORRECTLY DISMISSED CARSON II FOR ADJUDICATIVE EFFICIENCY GIVEN THAT THE DISPOSITIVE JURISDICTIONAL ISSUE WAS IDENTICAL TO THE ISSUE IN CARSON I

When an appellant files an MSPB appeal that raises the same claims raised in an earlier appeal before the decision in the earlier appeal has become final, the Board has held that it may dismiss the subsequent claims based upon adjudicatory efficiency. Zgonc v. Dep't of Defense, 103 M.S.P.R. 666, 669 (2006), aff'd, 230 F.App'x 967 (Fed. Cir. 2007). See also Boyd v. Dep't of Labor, 561 Fed. Appx. 978, 982 (Fed. Cir. 2014) (The Board correctly dismissed second MSPB appeal on grounds of adjudicatory efficiency where the first MSPB appeal effectively resolved the claims at issue in the second appeal). The Board also has dismissed appeals for administrative efficiency where an identity of issues exists and the controlling issues in the appeal will be determined in the prior appeal. Kinler v. Gen. Servs. Admin., 44 M.S.P.R. 262, 263 (1990).

Here, the question in both MSPB appeals was whether Mr. Carson made a nonfrivolous allegation that the OSC took a "personnel action" – as

that term is defined by the WPA – against him by failing to perform its statutory duties. Compare Appx92-93 (Mr. Carson's description of the "personnel action" in his first OSC complaint) with Appx161 (Mr. Carson's description of the "personnel action" in his subsequent OSC complaint). The Board noted that the issue was pending before this Court because Mr. Carson had filed a petition for judicial review of the final MSPB decision in Carson I. Appx17-18. Under the circumstances, it was proper for the Board to dismiss Mr. Carson's second IRA appeal for adjudicatory efficiency. We note that Mr. Carson does not challenge the Board's dismissal of his second appeal on the basis of adjudicatory efficiency. Indeed, on October 5, 2015, Mr. Carson filed a motion with the Court to consolidate his two cases, presumably for purposes of judicial economy. ECF Doc. #21.

CONCLUSION

For the reasons set forth above, the Court should affirm the decision of the Merit Systems Protection Board dismissing his first IRA appeal for lack of jurisdiction and his second IRA appeal for adjudicatory efficiency.

Respectfully submitted,

BRYAN G. POLISUK
General Counsel

/s/ Jeffrey A. Gauger
JEFFREY A. GAUGER
Attorney
Office of the General Counsel
Merit Systems Protection Board
1615 M Street, NW
Washington, DC 20419-0002
(202) 254-4488

DATE: June 3, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this date, service of the BRIEF FOR RESPONDENT MERIT SYSTEMS PROTECTION BOARD was made by electronic mail through the appellate CM/ECF system to the following individual:

Counsel for Petitioner:

B. Chadwick Rickman
Loring Justice, PLLC
11911 Kingston Pike, Suite 201
Knoxville, Tennessee 37934

Additionally, I hereby certify that on this date, service of the BRIEF FOR RESPONDENT MERIT SYSTEMS PROTECTION BOARD was made upon the following individuals by first class U.S. Mail:

Amici

Zena Denise Crenshaw-Logal
7519 West 77th Avenue
Crown Point, IN 46307

Andrew Dudley Jackson
7519 West 77th Avenue
Crown Point, IN 46307

Brenda McCracken
808 Baskin Drive
Joliet, IL 60404

DATE: June 3, 2016

/s/ Charlene E. Abbey
Charlene E. Abbey
Paralegal